AN IDEAL SCHOOL OF POLITICS AND JURISPRUDENCE.

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THE historical method of investigating the origin and growth of law, public and private, beginning with its germs in primitive society, attempts to explain its nature and meaning through the record of its development. The main difficulty in the way of complete demonstration is the fragmentary character of the evidence as to the initial forms of law in the early periods. Only by a comparison of such fragments as have been preserved in the survivals of ancient law or custom, in the usages of savage tribes and stagnant nations, or in the annals of a few ancient historians, is it possible to reconstruct primitive society as a complete organism. The same process of thought that gave birth to comparative philology and comparative anatomy, at a little later day brought forth comparative mythology, comparative politics and comparative jurisprudence. These new branches of knowledge are simply parts of the general result of the transition that has taken place since the end of the eighteenth century, from the old or artistic method of historical investigation to the new or sociological.

The term "politics," when taken in the Aristotelian sense, embraces not only the systems of constitutional law under which states are governed, but also the codes of domestic law by which the interior life of the state is regulated. Hence it is that Sir Frederick Pollock tells us, in his "History of the Science of Politics" that "jurisprudence is a branch of politics." Therefore, upon the threshold of his career, the student of law, as that term is usually employed, should be impressed with the fact that his knowledge can never be either complete or comprehensive until he masters the Science of Politics, a science which involves

the study, according to the comparative method, not only of the dominant constitutional systems, but of the typical codes of the civilized world. He should be exhorted to learn from Mr. Freeman that:

"for the purposes of the study of comparative politics, a political constitution is a specimen to be studied, classified and labelled, as a building or an animal is studied, classified and labelled, by those to whom buildings or animals are objects of study. We have to note the likenesses, striking and unexpected as those likenesses often are, between the political constitutions of remote times and places; and we have, as far as we can, to classify our specimens according to the probable casuses of those likenesses."[1]

By means of that process, a definite understanding has at last been reached as to the difference in structure between the modern state, as the nation, and the ancient state, as the city-commonwealth. Around those two radically different conceptions of the state are grouped all important political and legal theories, past and present,—the term "political" being used to distinguish the outer shell of the state from the "legal" code by which the details of its interior life are regulated. The simple statement of the matter should settle the fact that there can be no logical severance of the study of the outer shell of the state from that of its inner mechanism. A state is a "going concern" whose machinery is so interdependent that no one part can be fully understood without a knowledge of every other. If that be true, there can be no justification for the prevailing system which severs the study of these inseparable subjects from each other. The results of the Historical Method now demand that an ideal school for the combined teaching of Politics and Jurisprudence should recognize the following hierarchy of thought as the natural and logical one: (1) comparative politics; (2) comparative jurisprudence; (3) constitutional law of the particular state; (4) municipal law of the particular state; (5) international law, public and private; (6) international relations, diplomatic, financial, and economic. A student thus trained would have clearly before his mind, not only the entire structure of his own state and its international relations with other states, but also a comparative view of all the notable constitutions and codes of ancient and modern times. A tableau of subjects arranged upon that basis would provide,

[1] "Comparative Politics," p. 15.

in a natural and progressive order, a place for every important theme which has ever entered into the legal thought of mankind.

The most notable single result so far attained by the application of the comparative method to the study of political institutions, is embodied in the discovery, that the unit of organization in all the Aryan nations, from Ireland to Hindostan, is the naturally organized association of kindred—the family swelled into the clan—which, in a settled state, assumed the form of a village community. When we turn to the Hellenic world, in which the science of politics was born, we there find that the state is a composite whole that has arisen out of an aggregation of village communities. To the Greek mind the state, the city-commonwealth, was an organized society of men dwelling within a walled city, with a surrounding territory not too large to prevent its free inhabitants from habitually assembling within its limits to discharge the duties of citizens. Passing from the Greek to the Italian peninsula, we there also find the idea of the independent city to be the leading political idea. Upon the soil of Italy it was, that a group of village communities grew into a single vast and independent city that centralized within its walls the political power of the world. Departing from the exclusive policy of the Greek cities, Rome accomplished that marvellous result through a policy of incorporation, carried out by the extension of her franchise first to Italy, then to Gaul and Spain, and finally to the whole Empire. And so, whether we take for illustration the exclusive Greek city or the great Latin city extending its franchise to all the world, the ancient conception of the state as the city-commonwealth stands forth clearly and distinctly defined. Not until that fact has been firmly grasped, is it possible to understand the process through which, out of the settlements made by the migratory Teutonic nations upon the wreck of the Roman Empire, has gradually arisen the modern conception of the state as a nation, occupying a definite area of territory—the state as known to modern international law.

The completion of the transition from personal to territorial sovereignty is marked by the accession of the Capetian dynasty in France. The form then assumed by the French monarchy was reproduced in each dominion subsequently established or consolidated, and thus has arisen the state-system of modern Europe, in which the idea of territorial sovereignty is the basis of all in-

ternational relations. Not until the student has possessed himself of this modern idea of the state, is he prepared to enter upon the comparative study of the constitutions of France, Germany, Switzerland, Austria-Hungary, Sweden-Norway, Great Britain, Spain and the United States,—constitutions of the new type, in which the history of representative government is embodied. Not only should the growth of each of these constitutions be so outlined as to disclose the central and local organization and the administrative development of the parent state, but, also, in the case of the colonizing nations, to indicate the distinctive features, at least, of the colonial system of each.

In passing from such a review of comparative politics to that of comparative jurisprudence, the student would understand already that the great problems to be mastered in the new field are those involved in the origin and growth of Roman law, originally the code of a single city-commonwealth, and of English law, originally the code of a single Teutonic state representing the new type of territorial sovereignty which arose out of "the process of feudalization." Roman and English law, less colored by outside influences than the other legal systems of Western Europe, most perfectly present normal and untrammelled legal evolution in the freedom and individuality of their development. Legal science is really a Roman creation, an evolution from a code which, in its primitive form, was merely an enunciation in words of the customs of the Roman people, put forth before Roman society had finally emerged from that condition in which religious duty and civil obligation are inevitably confounded with one another. It has been said that Roman law begins with a code and ends with a code. The *Corpus Juris Civilis* was the final outcome of the process of evolution that began with the decemviral code of the Twelve Tables, four centuries and a half before Christ, and ended with the compilations made in the reign of Justinian, more than five centuries after Christ. With the creation of the primitive code, the spontaneous development of Roman law ceased; and then the question of questions that arose was as to the means of adapting an unelastic system of strict and highly formal law, originally confined to a single city, to the ever-increasing wants of a society which was expanding into an empire. That result was slowly and silently accomplished by the employment in their natural order of Legal Fictions, Equity and Legisla-

tion. As the *jus civile,* administered by the *praetor urbanus,* was the special property of those who shared in the Roman tradition and worship, the large body of resident foreigners at Rome would have been entirely without the benefits of law, but for the establishment of the praetor of foreigners *(praetor peregrinus),* whose duty it was to administer justice between Roman citizens and foreigners, between foreigner and foreigner, and between citizens of different cities within the Empire. As this praetor could not rely upon the law of any one city for the criteria of his judgments, he finally turned his eyes to the codes of all the cities from which came the swarm of litigants before him. In the generalizations necessarily made upon such data we have the beginnings of comparative jurisprudence, whose first fruit at Rome was the ascertainment of the fact that there are certain universal and uniform conceptions of justice common to all civilized peoples. Before this new growth *(jus gentium),* watered by the learning of the jurisconsults, reached its maturity, the intellectual life of Rome had passed under the dominion of her subjects in Attica and Peloponnesus just after they had yielded to the ascendency of the Stoic Philosophers, who were ever striving to discover in the operations of nature, physical, moral and intellectual, some uniform and universal force pervading all things that could be designated as the law of nature—the embodiment of universal reason—identical with Zeus, the supreme administrator of the universe. Through the mind of the Roman lawyer that splendid conception entered into the *jus gentium,* as an expanding and enriching force which finally lifted it into a higher sphere. In that way a broad principle of Greek philosophy became so blended with a particular branch of Roman commercial law, that the Antonine jurisconsults finally assumed the position that the *jus gentium* and the *jus naturae* are identical.

Not until the elements composing the body of Roman law prior to the compilations of Justinian have been analyzed and explained, should the effort be made to unfold the processes through which that law entered into the modern legal systems of Europe, notably into those of France, Spain, Germany and England. Such an effort necessarily involves an account of the influence of the Theodosian Code upon the legislation of the first Teutonic conquerors within the Empire, embodied in the code of Alaric II. known as the Breviary *(breviarium Alaricianum),* and in the

new *Lex Visigothorum* prepared in Spain in the seventh century. That summary of Roman rules and Gothic custom, superseding the earlier compilation of Alaric, became the basis for Spain's later codifications. Although rejected in Spain the code of Alaric was retained in the south of France, whence it was transmitted to the north, and then to Germany and England, where it continued to be the chief, if not the only, source of Roman law until the eleventh or twelfth century, when the *Corpus Juris Civilis* as compiled by Justinian (or, rather, Trebonian) became the basis of the enthusiastic revival of the study of jurisprudence.

After that point has been reached, it is easy to trace the extension of the new learning from the Italian schools of Bologna and Pisa into France, Spain, Holland, Germany and England. As the consolidation of the kingdom of France advanced, the expert jurists, trained in the systematic study of Roman law in the universities, who were sent in the name of the crown to enforce the royal jurisdiction, so embodied the principles of the Roman code in their decisions that in time it came to be accepted, in the greater part of France, as the common law of the land, in the absence of proof of special custom or enactment. With a strong infusion drawn from Germanic custom, the compilations of Justinian, after being modified and adapted to the new conditions of French history, survive as the basis of France's last great codification, the *Code Napoléon.* Beyond the Rhine, where Rome never established her dominion, not only deep-rooted Germanic custom but the decentralizing forces of feudalism, in an extreme form, confronted the efforts of the Holy Roman Empire to advance the work of unification by fostering the irresistible system of Roman law, whose principles were upheld by the imperial courts and imperial lawyers, its faithful administrators and advocates. Without being able to displace Germanic custom, the Roman code so modified and supplemented it that in the end, it became not only the basis of all German legal study, but the *prima facie* rule of decision in the absence of conclusive proof, upon the part of the suitor who pleaded established local usage, that such usage existed as recognized law. Through her acceptance of Roman jurisprudence, Holland was able to give to the world a master of it in the person of Hugo Grotius, who found, in the *jus gentium,* the reservoir from which he attempted to draw a body of rules adequate, by virtue of their intrinsic weight

and dignity, to compel the obedience of the then freshly emancipated European nationalities, without the coercive force of any recognized central authority. Thus it was that a particular branch of Roman commercial law became the germ out of which has been developed modern international law. Not until the extension of Roman law into the leading Continental European nations has been clearly explained, should the attempt be made to trace the processes, too important to be overlooked, through which the colonizing European nations have replanted it in their settlements beyond the seas.

The student of English customary law should lay firm hold upon the fact that, through the Teutonic conquest and settlement of Britain, the whole fabric of Teutonic life was replanted, within certain limits, in its primitive purity, on a free and unencumbered soil. As Taine has expressed it: "While the Germans of Gaul, Italy and Spain became Romans, the Saxons retained their language, their genius and manners, and created in Britain a Germany outside of Germany."[1] The Teutonic political system as a whole rested upon the collective weight of individual freemen acting together in an expanding series of popular assemblies, whose jurisdiction, beginning with the smallest local affairs, so widened as to embrace the gravest national concerns. The foundations of this primitive system, composed of these local, self-governing communities—the nurseries of the customary law—were so deeply laid in Britain, that the system itself has been able to survive all the mutilations through which the English nation has passed. When the Norman came, he seized the Central powers of the state, but the local Teutonic system remained unshaken by the assault. Upon this local system, as a substructure, the Norman built up his administrative system, as a superstructure, and out of the fusion between the two has grown the modern constitution. The same agencies which, during the Angevin reigns, brought about the amalgamation of the new administrative system and the ancient local machinery, also brought about a union between the new system of royal law, which radiated from the *curia legis,* and the ancient system of customary law as administered in the local courts. Out of the union of a certain branch of royal law—the system of inquisitions introduced into England by the Normans, who derived it directly from the Frank Capitu-

[1] "History of English Literature," vol. 1, p. 50.

laries, into which it was probably adopted from the fiscal regulations of the Theodosian Code—with a certain kind of witness-proof imbedded in the customary law, has been gradually developed the English jury or judgment, the trial-jury of modern times. More potent still was the influence of Roman law as asserted in the Court of Chancery presided over first by great ecclesiastics, who remedied the deficiencies of the customary law through the agency of Roman legal principles and procedure; in the Ecclesiastical Courts, constructed on the same plan, and charged, until very recent times, with the administration of all estates and all trusts in England; and in the Courts of Admiralty, administering a code of maritime law whose deficiencies were "supplied from that great fountain of jurisprudence, the civil law, which was generally adopted to fill up the chasms that appeared in any of the municipal customs of modern European nations."[1] To such an extent did Roman influence affect legislation in the reigns following the Conquest, that competent critics have declared that wellnigh one-half of the contents of the laws of Henry I. consist of precepts drawn from Roman sources. As Vacarius began the systematic teaching of the civil and canon law at Oxford as early as 1149, it is not strange that we should be able to trace the influence of the imperial and pontificial jurisprudence in the works of such text writers as Granvill, Bracton, Britton and Fleta. The familiarity of Bracton with it is manifest not only from its frequent quotations from the Digest, Institutes and Code of Justinian, but also from his use of Roman definitions and maxims. When the time came for English judges to realize that the doctrines of the customary law were not equal to the growing exigencies of English commerce by land and sea, Lord Mansfield, a well-trained civilian, indicated a disposition to look to foreign sources by quoting, in his opinion in Luke *vs.* Lyde,[2] the laws of Rhodes, the Digest, the *Consolato del Mare,* the laws of Oléron and Wisby, *Roccus de Navibus et Naulo,* and the *Marine* Ordinance of Louis XIV.

And yet, after all has been said that can be said, as to the extent to which English customary law has been refined, expanded, enriched by the absorption of Roman elements, the fact remains that it has never lost either its identity or its distinctive charac-

[1] Reeves, "History English Law," vol. iii, p. 388.

[2] 2 Burr, 882. Involving the important question of freight *pro rata.*

ter. In the same sense in which the English language is Teutonic, English law is Teutonic. Just as the Romance words which the Norman brought with him were woven into the woof and warp of the English tongue, so the Norman's ideas of law and administration were woven into the primitive constitution. In England as in Rome the motive power of legal change has ever been drawn not from a small governing class, but from the nation as a whole. For centuries, that popular initiative has been unconsciously adapting the primitive code to the ever-increasing wants of a progressive society. To paraphrase the language of Savigny, as to the nature of law in general, English law may be described as an aspect of the total common life of the nation; not something made by the nation as matter of choice or convention, but, like its manners and language, bound up with its existence, and indeed helping to make the nation what it is.

Not until his horizon has been widened by an adequate review of comparative politics and comparative jurisprudence, is the student of the Constitution of the United States prepared to begin the analysis of the complex political system under which he lives. Our federal republic is the outcome of all the ages; it is not the result of special creation, but of evolution. It arose out of an aggregation of States. As Mr. James Bryce has expressed it: "They existed before it. They could exist without it."[1] The all-important fact to grasp at the outset is, that the unit—the typical English state in America—is simply a natural and involuntary reproduction of the English state in Britain, which was the outcome of aggregation. Out of a union of townships grew what was finally known in England as the hundred; out of the union of hundreds grew the modern shire; out of a union of modern shires grew the English kingdom. The power to subdue and settle a new country, and then to build up a state by this process of aggregation, constitutes the strength of the English nation as a colonizing nation. By that process, capable under favorable geographical conditions of unlimited expansion, has been built up the federal republic of the United States. "In America . . it may be said that the township was organized before the county, the county before the State, the State before the Union."[2] In order to ascertain how the English colonies in America were construct-

[1] "American Commonwealth," vol. 1, p. 14.

[2] Tocqueville, "Democracy in America," vol. 1, p. 49

ed, we must look behind their charters at the lives of the men who made the settlements out of which they grew. "Under the shell there was an animal, and behind the document there was a man. The shell and the document are lifeless wrecks, valuable only as a clew to the entire and living existence. We must reach back to this existence, endeavor to re-create it."[1] In some instances, the colony was formed by the coalescence of the local communities before a charter was granted; in others, the charter was granted first, and the colony then sub-divided into districts as the local communities were organized. Through the results of the Revolution, the people of each colony became themselves sovereign, and as soon as they "took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the Crown or the Parliament, became immediately and rightfully vested in the State."[2] When the offspring is compared with the parent, when the English state in America is compared with the English state in Britain, the resemblance is too close to escape the most careless observer. In both, the political sub-structure is the same,—the ancient Teutonic system of local, self-governing communities composed of the township, the hundred, and the shire. In each, municipal organization rests upon substantially the same basis. So far as central organization is concerned, every American State is a mere reproduction of the central organization of the English kingdom, with such modifications as have necessarily resulted from the abolition of nobility, feudality and kingship. In the new, as in the old, the central powers of the state are divided into three departments—legislative, executive, and judicial—which, in the same qualified sense, are separate and distinct from each other. The first brand-new idea contributed to the politics of the world by the process of state-building in America, is embodied in the vitally important and far-reaching principle known as constitutional limitations upon the legislative power—an invention which rests upon the doctrine of the sovereignty of the people, as distinguished from the sovereignty of Parliament.

Any attempt to describe the process through which the American colonial commonwealths were drawn together, first in lax and imperfect confederacies, and finally into the most perfect

[1] Taine, "History of English Literature," vol. 1, p. 1.

[2] Taney, C. J., in Martin *et al vs.* The Lessee of Waddell, 16 Peters, p. 416.

federal union which has ever existed, should be prefaced by an outline of the history of federalism as a system of government. Because they represent the closest preceding approaches to the perfect federal ideal, special examination should be made of the constitutions of the Achaian League (B.C. 281-146); of the Confederation of the Swiss Cantons (from 1291); and of the Seven United Provinces of the Netherlands (1579-1795). The outcome of the inquiry will settle the fact that the fundamental principle upon which all such fabrics rested was the requisition system, under which the federal head was simply endowed with the power to make requisitions for men and money upon the states composing the league for federal purposes, while the states alone, in their corporate capacity, possessed the power to execute and enforce them. Upon that antiquated and inefficient plan was constructed the first federal constitution of the United States embodied in the Articles of Confederation. No advance whatever was made until the making of the second federal Constitution of 1787, when America gave birth to a novel and irresistible political idea, by devising a federal system which should act not on the States but directly on the individual, and vest in Congress full power to carry its laws into effect. That path-breaking idea, which the Websters (Pelatiah and Noah) were the first to express, embodied the second vitally important political principle to which our career as a nation has given birth. Out of its union with the principle of constitutional limitations on the legislative power has arisen a federal creation without historic prototype.

Not until he is armed with a clear understanding of the structure of the outer shell of the dual political system under which he lives, is the student of American jurisprudence ready to enter upon the technical study of municipal law as arranged in the courses of the ordinary law-school. Thus armed, he cannot suffer so much from the narrowing and bewildering system of case-law instruction, because he will be in possession of much of the knowledge which that system presupposes. When he is required to know the difference between law and equity, he will understand that he is dealing with the two historic codes—Roman and English—side by side. If he is called upon for a thesis upon the Constitution of Louisiana, he will be prepared to explain how the outer shell of a State may be Teutonic and the inner mechanism Roman.

After the entire structure of the particular state has been fully mastered, nothing remains for examination but its relations with other states of the same class. So far as those relations are legal, they are embodied in the system of rules generally known as international law, public and private. In order, however, to attain to a complete knowledge of such relations, the inquiry should be so extended as to embrace their diplomatic, financial and economic aspects. Guided by such a scheme of progressive and unbroken thought, the student could traverse, possibly in three, certainly in four years, the entire field occupied by Politics and Jurisprudence, cheered on the way by the consciousness that each succeeding stage of the journey will be made easier by the knowledge acquired during that immediately preceding it.

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